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August 23, 1999

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: CC Docket 98-147, Deployment of Wireline Services Offering
Advanced Telecommunications Capability**

Dear Ms. Salas:

On Friday, August 20, Mr. J. Pachulski and I, representing Bell Atlantic, met with Dr. R. Pepper, Chief of the Office of Plans and Policy. Also participating in the meeting were Ms. D. Lampert and Mr. M. O'Connor, representing AOL. The purpose of the meeting was to discuss Bell Atlantic's wholesale Asymmetric Digital Subscriber Line (ADSL) service provided to Internet Service Providers and competing carriers.

The attached paper was used as a basis for discussion during the meeting.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary.

Sincerely,

Handwritten signature of Susanne Guyer in cursive script.
Susanne Guyer

Attachment

cc: R. Pepper

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Regulatory Status of Internet Service Providers Offering ADSL Services to their Customers

Bell Atlantic has filed tariffs to offer Asymmetric Digital Subscriber Line ("ADSL") service on a wholesale basis to Internet Service Providers ("ISPs") and competing carriers. ISPs, such as FlashCom, purchasing under this tariff would use Bell Atlantic's ADSL service as an input to produce a package of high-speed Internet access services that they would offer to their retail customers. ISPs would not offer Bell Atlantic's ADSL service on a stand-alone basis without packaging it with their Internet access services and thus would not simply resell Bell Atlantic's telecommunications service.

The fact that ISPs include telecommunications services, such as ADSL, as part of their package of Internet access services does not change their regulatory status from information service providers to telecommunications carriers. The Federal Communications Commission has already decided that ISPs are properly classified as information service providers, rather than telecommunications carriers, even though they use data transport services as an input to their Internet access services.

Under the express terms of the 1996 Act, information services are a separate and distinct class of services from telecommunications services. And as the Commission itself has repeatedly emphasized, this is equally true where an information service provider *uses* telecommunications as an input in providing its packaged information service.

The 1996 Act separately defines "telecommunications service" and "information service." The term "telecommunications service" is limited to "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 3(43). By contrast, an "information service" is defined as "the offering of a capability for generating, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" 47 U.S.C. § 3(20).

The Commission explained the distinction between "information services" and "telecommunications services" in its Report to Congress on Universal Service. Report to Congress, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67 (rel. April 10, 1998). As the Commission stated, "[a]fter careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of 'telecommunication service' and 'information service' in the 1996 Act are mutually exclusive." *Id.* at ¶ 39.

Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" even though

it uses telecommunications to do so. *Id.*

An information service provider is *using* telecommunications, not *providing* it. It is the company engaged in the provision of transmission capacity *to* information service providers that is providing telecommunications:

[A]n entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not “change . . . the form and content” of the information. When an entity offers subscribers the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” it does not *provide* telecommunications; it is *using* telecommunications.

Id. at ¶ 41 (footnotes omitted) (emphasis added).¹

Based on these statutory definitions, the FCC has determined that Internet access services are information services, not telecommunications services.

The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers’ own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an “information service.”

In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), ¶ 80 (rel. April 10, 1998).

The FCC has further concluded that ISPs are information service providers – not telecommunications carriers – because they do more than just resell data transport services.

Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and

¹ See *Report to Congress* at ¶ 43 (“The Senate Report stated in unambiguous terms that its definition of telecommunications ‘excludes those services . . . that are defined as information services.’ Information service providers, the Report explained, “do not ‘provide’ telecommunications services; they are users of telecommunications services.”) (quoting *Senate Report* [S. Rep. No. 23. 104th Cong., 1st Sess. (1995)] at 18, 28) (footnotes omitted) (emphasis added).

others. In offering service to end users, however, they do more than resell those data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service. We conclude that, under the 1996 Act, they are appropriately classed as information service providers.

Id. at ¶ 81.

ISPs are not unique in using telecommunications services as an input to the information services they provide to their customers. For example, voice mail companies may use telecommunications services, such as private lines, as an input to their services in order to reach their business customers' premises and to carry calls from those premises back to their voice mail equipment. These telecommunications services are part of the package of information services provided by voice mail companies and do not transform them from information service providers to telecommunications carriers.

Similarly, alarm companies typically use telecommunications services, such as dedicated data circuits, that are connected from the alarm company's office to their business customers' premises in order to monitor the status of their customers' alarm systems. Again, these telecommunications services are part of the package of information services provided by alarm companies and do not transform alarm companies from information service providers to telecommunications carriers.

The FCC has long held that information service providers may use telecommunications services to provide their information services and that doing so does not change them from information service providers to telecommunications carriers. Likewise, ISPs that purchase Bell Atlantic's ADSL service on a wholesale basis and use it to provide high-speed Internet access service packages to their retail customers are properly classified as information service providers, rather than telecommunications carriers.